UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8
999 18TH STREET - SUITE 300
DENVER, CO 80202-2466
Phone 800-227-8917
http://www.epa.gov/region08

Ref: 8ENF-W

CERTIFIED MAIL #7003 2260 0002 0331 5413
RETURN RECEIPT REQUESTED

SEP 15 2005

James P. Daniels
27160 470th Avenue
Tea, SD 56074-8112

Re: Notice of Proposed Assessment of
Administrative Civil Penalty
Docket No. CWA-08-2005-0052

Dear Mr. Daniels:

Enclosed is an Administrative Penalty Complaint (Complaint), which the United States Environmental Protection Agency (EPA) is issuing to you and to two companies, Sunset Development LLC, and Daniels Construction, Inc., for which you are the registered agent. In the Complaint, EPA alleges that the three named Respondents violated section 301 of the Clean Water Act (Act), 33 U.S.C. § 1311, by placement of dredged and fill material into two separate wetlands and a linear waterway and its associated wetlands located in the east half of section 7, Township 100 North, Range 50 West, in Lincoln County, South Dakota. The Complaint proposes that EPA assess a penalty of up to $157,500 for these violations, pursuant to section 309 of the Act, 33 U.S.C. § 1319.

You have the right to a hearing to contest the factual allegations in the Complaint. We have enclosed a copy of 40 C.F.R. part 22, which identifies the procedures EPA follows in administrative penalty proceedings of this type. Please note the requirements for an answer to the Complaint in 40 C.F.R. § 22.15(b).

If you wish to contest the allegations in the Complaint or the penalty proposed in the Complaint, you must file an answer within thirty (30) days of receipt of the enclosed Complaint with the EPA Region 8 Hearing Clerk at the following address:

Regional Hearing Clerk (8RC)
U.S. EPA Region 8
999 18th Street, Suite 300
Denver, CO 80202-2466

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If you do not file an answer by the applicable deadline [See 40 C.F.R. § 22.15(a)], you may be found in default. A default judgment may impose the full penalty EPA requests in a motion for default.

EPA encourages settlement of these proceedings at any time prior to a formal hearing if the settlement is consistent with the provisions and objectives of the Act and applicable regulations [See 40 C.F.R. § 22.18]. If a mutually satisfactory settlement can be reached, it will be formalized in a Consent Agreement. Upon final approval of the Consent Agreement by the Regional Judicial Officer, you will be bound by the terms of the Consent Agreement and will waive your right to a hearing on, and judicial appeal of, the agreed upon civil penalty. You have the right to be represented by an attorney at any stage of the proceedings, including any informal discussions with EPA, but it is not required.

Please note that arranging for a settlement meeting does <u>not</u> relieve you of the need to file a timely answer to EPA's Complaint. If you wish to discuss settlement of this matter, the most knowledgeable person on my staff for legal issues is Peggy Livingston, Enforcement Attorney, who can be reached at 303-312-6858. The most knowledgeable person on my staff for technical issues is Monica Heimdal, Enforcement Officer, who can be reached at 303-312-6359. We urge your prompt attention to this matter.

Sincerely,

Michael T. Risner
for

Carol Rushin
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

Enclosures:
1. Administrative Complaint
2. Administrative Penalty Procedures (40 C.F.R. part 22)
3. Certificate of Service

cc: Tina Artemis, EPA, Regional Hearing Clerk
Howard Kenison, Lindquist & Vennum (certified mail)
David Lagrone, U.S. Army Corps of Engineers
John Miller, South Dakota Department of Environment and Natural Resources
Steven Naylor, U.S. Army Corps of Engineers

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2005 SEP 15 PM 2:40

FILED
EPA REGION VIII
HEARING CLERK

IN THE MATTER OF:	
Sunset Development, LLC **27160 470th Ave.** **Tea, SD 57064-8112**	
Daniels Construction, Inc. **27160 470th Ave.** **Tea, SD 57064-8112**	**ADMINISTRATIVE PENALTY COMPLAINT**
James P. Daniels **27160 470th Ave.** **Tea, SD 57064-8112**	Docket No. CWA-08-2005-0052
Respondents.	

This Administrative Penalty Complaint ("Complaint") is issued under the authority vested in the Administrator of the U.S. Environmental Protection Agency ("EPA") by section 309(g)(1)(A) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g)(1)(A), and properly delegated to the undersigned EPA official ("Complainant").

Pursuant to section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and in accordance with the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits," 40 C.F.R. part 22, Complainant hereby proposes the assessment of a civil penalty against Sunset Development, LLC, Daniels Construction, Inc., and James P. Daniels ("Respondents") for their violations of section 301(a) of the CWA, 33 U.S.C. § 1311(a).

I. ALLEGATIONS

1. Respondent Sunset Development, LLC ("Sunset Development") is a limited liability company organized under the laws of the State of South Dakota. The address of the registered office for Sunset Development is 27160 470th Ave., Tea, SD 57064-8112. Its registered agent at that address is James P. Daniels.

2. Respondent Daniels Construction, Inc. ("Daniels Construction") is a corporation incorporated under the laws of the State of South Dakota. The address of the registered office for Daniels Construction is 27160 470th Ave., Tea, SD 57064-8112. Its registered agent at that address is Jim (James P.) Daniels.

3. Respondent James P. Daniels ("Daniels") is an individual who at all relevant times has been the manager of Sunset Development and the president and a director of Daniels Construction.

4. The Respondents are engaged in real estate development in the State of South Dakota.

5. Daniels Construction also has done business under the name of "Sunset Ridge," under which it, along with Sunset Development and Daniels, has been engaged in developing a residential subdivision known as the "Sunset Ridge Addition," as the "Taylor Ridge Addition," and/or as "Sunset Ridge." In this Complaint, this subdivision will be referenced as the "Site."

6. The Site is located in the east half of section 7, Township 100 North, Range 50 West, in Lincoln County, South Dakota.

7. The Respondents have owned, controlled, and/or operated the Site at all times relevant to this proceeding.

8. Prior to construction, the Site contained several water bodies, including a 0.4-acre wetland, a 0.6-acre wetland, and a linear waterway bordered by 3.0 acres of wetlands. Prior to construction, the two smaller wetlands were connected by surface water and were tributaries of, and adjacent to, the linear waterway.

9. The linear waterway is an unnamed tributary to the Big Sioux River. The Big Sioux River flows into the Missouri River. Both the Big Sioux River and the Missouri River are navigable, interstate waters.

10. On April 4, 2001, a consultant retained by the Respondents wrote to the South Dakota Regulatory Office of the United States Army Corps of Engineers ("Corps") regarding whether the wetlands at the Site were subject to CWA jurisdiction.

11. On May 23, 2001, the Corps determined that the wetlands described in paragraph 8, above, were "waters of the United States" subject to the jurisdiction of the CWA.

12. On June 12, 2001, the Corps notified the Respondents' consultant that the 0.4-acre wetland, the 0.6-acre wetland, and the linear waterway and its associated 3.0 acres of wetlands referenced in paragraph 8, above, were connected to a surface water drainage system that flows into the Big Sioux River.

13. The Corps' June 12, 2001, letter also provided the Respondents' consultant with an application form for a Department of the Army permit authorizing the discharge of dredged or fill material into waters of the United States.

14. On or about August 3, 2001, the Respondents' consultant, on behalf of Sunset Development, submitted a permit application to the Corps seeking authorization to fill four (4) acres of wetlands at the Site.

15. By letter dated September 7, 2001, the Corps acknowledged receipt of the permit application from the Respondents' consultant, stating at the close of its letter that "THIS ACKNOWLEDGEMENT OF RECEIPT OF YOUR APPLICATION DOES NOT AUTHORIZE COMMENCEMENT OF WORK ACTIVITY." [Emphasis in original]

16. On September 14, 2001, the Corps and the South Dakota Department of Environment and Natural Resources (SDDENR) issued a "Joint Notice of Permit Pending," soliciting comments from the public on the impacts of the activity covered by Sunset Development's permit application.

17. By letter dated January 15, 2002, the Corps notified Respondents' consultant that after considering comments from the public, the Corps had determined that the Respondents' proposed wetland mitigation plan would not adequately replace the lost functions of the existing wetland basins and the linear wetland. The Corps advised that the consultant submit a supplemental or revised mitigation plan.

18. On May 14, 2004, the Respondents' consultant submitted a revised wetland mitigation plan to the Corps.

19. On June 2, 2004, the Corps conducted an inspection on the Site for the purpose of evaluating the proposed mitigation plan that had been submitted on May 14, 2004.

20. During its June 2, 2004, inspection, the Corps found that fill material had been discharged into the 0.4-acre and 0.6-acre wetlands referenced in paragraph 8, above. The Corps also found that dredged and/or fill material had been discharged into a portion of the linear waterway and its associated wetlands referenced in paragraph 8, above.

21. By letter dated June 24, 2004, the Corps notified Respondent Sunset Development that discharges referenced in the previous paragraph had not been authorized and requested that Sunset Development cease and desist any further unauthorized work at the Site.

22. Aerial photographs demonstrate that the 0.6-acre wetland and portions of the linear waterway were filled some time prior to April 26, 2001, and that by May 3, 2002, the 0.4-acre wetland had been filled and the linear waterway had been further impacted.

23. The Respondents discharged and/or allowed the discharge of the dredged and/or fill material described in the preceding three paragraphs.

24. The Respondents' discharges described in paragraphs 20-23, above, resulted in the elimination of the 0.4-acre and the 0.6-acre wetlands and in adverse impacts to portions of the linear waterway and its associated wetlands.

25. To date, the Respondents have neither restored the wetlands or linear waterway nor mitigated for their losses.

26. The unauthorized fill described in paragraphs 20-23, above, remains in place.

27. On September 28, 2004, EPA issued an Administrative Order for Compliance ("Compliance Order") to the Respondents. Among other things, the Compliance Order directed the Respondents to mitigate for the impacts to waters of the United States from their unauthorized activities and to submit a mitigation plan to EPA no later than forty-five days after receiving the Compliance Order.

28. At the Respondents' request, EPA twice extended the deadline for submission of the mitigation plan, ultimately to January 3, 2005.

29. On December 23, 2004, the Respondents' consultant submitted an initial draft mitigation plan to EPA.

30. By letter dated May 27, 2005, EPA provided the Respondents' consultant with comments on the mitigation plan.

31. On June 20, 2005, EPA received an initial response to the May 27, 2005, comments. On July 28, 2005, the Respondents' consultant sent EPA amendments to that response.

32. To date, the mitigation plan has not been approved by EPA.

33. The discharges described in paragraphs 20-23, above, were performed using common earthmoving vehicles and equipment, which were operated by or on behalf of Respondents.

34. Each Respondent is a "person" within the meaning of section 502(5) of the CWA, 33 U.S.C. § 1362(5).

35. The discharged dredged and fill materials referenced in paragraphs 20-23, above, are "dredged material" and "fill material" within the meaning of 33 C.F.R. § 323.2(c) and 33 C.F.R. § 323.2(e), respectively, and "pollutants" within the meaning of section 502(6) of the CWA, 33 U.S.C. § 1362(6).

36. The vehicles and equipment described in paragraph 33, above, are each a "point source" as that term is defined in section 502(14) of the CWA, 33 U.S.C. § 1362(14).

37. The wetlands and the unnamed tributary to the Big Sioux River referenced in paragraphs 8 and 9, above, are "waters of the United States" within the meaning of 33 C.F.R. § 328.3(a) and therefore "navigable waters" within the meaning of section 502(7) of the CWA, 33 U.S.C. § 1362(7).

38. The Respondents' placement of dredged and fill material into the wetlands and into the unnamed tributary to the Big Sioux River constitutes the "discharge of pollutants" within the meaning of section 502(12) of the CWA, 33 U.S.C. § 1362(12).

39. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants by any person into waters of the United States except as in compliance with, among other things, section 404 of the CWA, 33 U.S.C. § 1344.

40. Section 404 of the CWA, 33 U.S.C. § 1344, sets forth a permitting system authorizing the Secretary of the Army, acting through the Chief of Engineers of the Corps, to issue permits for the discharge of dredged or fill material into navigable waters, which are defined as waters of the United States.

41. 33 C.F.R. § 323.3(a) specifies that, unless exempted pursuant to 33 C.F.R. § 323.4, a permit issued by the Corps is required for the discharge of dredged or fill material into waters of the United States.

42. Respondents are not and never have been authorized by a permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344, to discharge dredged and/or fill material to any waters of the United States on the Site.

43. The Respondents' discharges of dredged and/or fill material at the Site have not been exempt from permitting pursuant to section 404(f) of the CWA, 33 U.S.C. § 1344(f), or 33 C.F.R. § 323.4.

44. Respondents' discharges of dredged and/or fill material at the Site violate section 301(a) of the CWA, 33 U.S.C. § 1311(a). Each discharge of pollutants from a point source by Respondents into waters of the United States without authorization by a permit issued

pursuant to section 404 of the CWA, 33 U.S.C. § 1344, constitutes a violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a). Each day the discharged dredged and/or fill material remains in place without the required permit(s) constitutes an additional day of violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a).

45. Before the discharges described above, the wetlands and linear waterway provided various functions and values, including habitat for aquatic life, for local and migratory birds, and for other wildlife; water quality enhancement; water storage and retention; ground water recharge; flood control; and aesthetics.

46. Pursuant to CWA § 309(g), 33 U.S.C. § 1319(g), EPA will consult with Tim Tollefsrud, Director, Division of Environmental Services, South Dakota Department of Environment and Natural Resources, on the assessment of this administrative penalty by furnishing a copy of this Complaint and inviting him to comment on behalf of South Dakota.

II. PROPOSED ADMINISTRATIVE PENALTY

Based upon the foregoing allegations, and pursuant to its authority under section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), EPA Region 8 hereby proposes to assess an administrative penalty of up to $157,500 against Respondents.

EPA proposes to assess a penalty after taking into account all factors identified at section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), as more fully discussed in Exhibit 1. The statutory maximum from section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), has been adjusted for inflation to $157,500, as described in 40 C.F.R. part 19.

The CWA penalty factors include the nature, circumstances, extent, and gravity of the violations. The CWA penalty factors also include the Respondents' prior compliance history,

Respondents' degree of culpability for the cited violations, any economic benefit or savings accruing to Respondents by virtue of the violations, Respondents' ability to pay the proposed penalty, and other matters that justice may require, which are also discussed in Exhibit 1.

III. TERMS OF PAYMENT

If Respondents do not contest the findings and assessments set out above, they may pay EPA a penalty of $157,500 for the violations. If such payment is made within 30 calendar days of receipt of this Complaint, then no answer need be filed. Penalty payment must be made by certified or cashier's check payable to "Treasurer, the United States of America," and remitted to:

Regional Hearing Clerk
P.O. Box 360859 M
Pittsburgh, PA 15251

A copy of the check shall be sent to:

Margaret J. ("Peggy") Livingston
Enforcement Attorney
U.S. EPA, Region 8 (8ENF-L)
999 18th Street, Suite 300
Denver, CO 80202-2466

A transmittal letter identifying the case title and docket number must accompany the remittance and copy of the check. The case title and docket number should also be indicated directly on the check.

Neither the assessment nor the payment of an administrative penalty pursuant to section 309(g) of the CWA shall affect Respondents' continuing obligation to comply with the CWA or any other Federal, state, or local law or regulation or any compliance order issued under the CWA.

IV. NOTICE OF OPPORTUNITY TO REQUEST A HEARING

As provided in section 309(g)(2)(B) of the CWA, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. § 22.15(c), Respondents have the right to a hearing in this matter. If Respondents (1) contest any material fact upon which the Complaint is based, (2) contend that the amount of penalty proposed in the Complaint is inappropriate, or (3) contend that they are entitled to judgment as a matter of law, Respondents must file a written answer in accordance with 40 C.F.R. § 22.15 within thirty (30) days after service of the Complaint.

Respondents' answer must (1) clearly and directly admit, deny, or explain each of the factual allegations contained in the Complaint, (2) state the circumstances or arguments that are alleged to constitute grounds for defense, (3) state the facts intended to be placed at issue, and (4) specifically request a hearing, if desired. 40 C.F.R. § 22.15(b). Failure to admit, deny, or explain any materially factual allegation contained in the Complaint constitutes an admission of the allegation. 40 C.F.R. § 22.15(d). An original and one copy of Respondents' answer must be filed with:

Regional Hearing Clerk (8RC)
U.S. EPA, Region 8
999 18th Street, Suite 300
Denver, CO 80202-2466

A copy of the answer and each other document filed in this action must be sent to:

Margaret J. ("Peggy") Livingston
Enforcement Attorney
U.S. EPA, Region 8 (8ENF-L)
999 18th Street, Suite 300
Denver, CO 80202-2466

If Respondents fail to request a hearing or to file a written answer within the thirty (30) day time limit, they may waive their rights to contest any of the allegations set forth in this Complaint and/or be subject to a default judgment pursuant to 40 C.F.R. § 22.17 imposing the full penalty proposed in this Complaint and/or default motion.

EPA is obligated to provide the public with an opportunity to comment on this proceeding and/or to participate in the hearing, if any. Please see section 309(g)(4)(B) of the CWA and 40 C.F.R. § 22.45 for more details, including procedures for members of the public to participate in the hearing and comment on any settlement.

V. SETTLEMENT CONFERENCE

EPA encourages the exploration of settlement possibilities through an informal settlement conference. **Please note that a request for, scheduling of, or participation in a settlement conference neither substitutes nor extends the deadline for filing an answer and request for hearing as set out above**. The settlement process, however, may be pursued simultaneously with the administrative litigation process. If a settlement can be reached, its terms must be expressed in a written consent agreement signed by the parties and incorporated into a final order by the Regional Judicial Officer. 40 C.F.R. § 22.18.

Please direct any request for a settlement conference, or any questions regarding this Complaint, to:

Margaret J. ("Peggy") Livingston
Enforcement Attorney
U.S. EPA, Region 8 (8ENF-L)
999 18th Street, Suite 300
Denver, CO 80202-2466
303-312-6858

Docket No. CWA-08-2005-0052

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 8
Complainant.

Date: 9/14/05

Michael T. Risner for
Carol Rushin
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

EXHIBIT 1

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8
999 18TH STREET - SUITE 300
DENVER, CO 80202-2466
Phone 800-227-8917
http://www.epa.gov/region08

Ref: 8ENF-W

MEMORANDUM

SUBJECT: Analysis of Penalty Assessed in Class II Complaint in the Case of Sunset Development, LLC, Daniels Construction, Inc., and James P. Daniels for Clean Water Act Section 301 Violations

FROM: Monica Heimdal
Section 404 Enforcement Officer

TO: Sunset Development, LLC, Enforcement Case File

This memorandum presents the Environmental Protection Agency's (EPA) analysis of the factors that are to be considered in determining the amount of the civil penalty to assess in the administrative penalty action against Sunset Development, LLC, Daniels Construction, Inc., and James P. Daniels, the Respondents in administrative penalty proceedings arising from Clean Water Act (CWA) section 301 violations. The Respondents are engaged in real estate development in the State of South Dakota. The location of the violations is in the east half of section 7, Township 100 North, Range 50 West, in Lincoln County, at a residential subdivision known as Sunset Ridge. The factors are set forth in section 309(g)(3) of the CWA, 33 U.S.C. § 1319(g)(3), and are as follows: (1) the nature, circumstances, extent, and gravity of the violations; (2) the Respondents' prior compliance history; (3) the Respondents' degree of culpability; (4) the Respondents' economic benefit or savings resulting from the violations; (5) the Respondents' ability to pay the proposed penalty; and (6) any other matters that justice requires be considered.

The analysis of the required factors identified above supports the proposed assessment of up to a $157,500 penalty in the Administrative Penalty Complaint. The substantive aspects of this analysis are discussed below.

A. Nature, Circumstances, Extent, and Gravity of the Violations

In considering the above factors, EPA examines the number, type, duration, and significance of the violation or violations, as well as the actual and potential harm to human health and the environment. In the matter involving the Respondents' alleged CWA section 301 violations, EPA alleges that the Respondents discharged or allowed the discharge of fill material into a 0.4-acre wetland and a 0.6-acre wetland. EPA also alleges that the Respondents

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discharged or allowed the discharge of dredged and/or fill material into a portion of a linear waterway and its 3.0 acres of associated wetlands. Prior to construction, the two smaller wetlands were connected by surface water and were tributaries of, and adjacent to, the linear waterway. The linear waterway is an unnamed tributary to the Big Sioux River. The Big Sioux River flows into the Missouri River, both of which are navigable, interstate waters. The discharges were undertaken without a permit, in violation of CWA section 301(a), which prohibits the discharge of a pollutant to waters of the United States unless authorized by a permit issued under CWA section 404.

In the present case, on June 12, 2001, the U.S. Army Corps of Engineers (Corps) notified the consultant for the Respondents that a 0.4-acre wetland, a 0.6-acre wetland, and a linear waterway and its associated 3.0 acres of wetlands on the Respondents' property were connected to a surface water drainage system that flows into the Big Sioux River and were therefore jurisdictional. The Corps also provided the Respondents' consultant with an application form for a Department of the Army permit which, if granted, would authorize the discharge of dredged or fill material into waters of the United States.

On or about August 3, 2001, the consultant, on behalf of Sunset Development, submitted a permit application to the Corps seeking authorization to fill four acres of wetlands at the Site in conjunction with the construction of a residential development. On October 12, 2001, the Corps sent a letter stating that a thorough alternatives analysis must be completed before the permit application could be processed. The Corps then sent a letter on January 15, 2002, to the consultant identifying numerous deficiencies with the proposed mitigation plan and advising that a revised mitigation plan must be submitted. In addition, the Corps noted it was still awaiting the alternatives analysis requested on October 12, 2001. Despite numerous subsequent requests, as well as assistance, from the Corps, the applicant never provided a satisfactory alternatives analysis to address the proposed impacts to wetlands. Therefore, the Corps never offered the applicant a draft permit.

The consultant finally submitted a revised mitigation plan to the Corps on May 14, 2004, prompting the Corps to conduct a site visit on June 2, 2004, to inspect the wetlands relative to the proposed mitigation plan. The Corps found that the residential area was nearly completed and that the Respondents had discharged or allowed the discharge of fill material into the 0.4-acre wetland and the 0.6-acre wetland. The Corps also found that the Respondents had discharged or allowed the discharge of dredged and/or fill material into a portion of the linear waterway and its associated wetlands. Aerial photographs indicate the unauthorized discharges began during early 2001, some time prior to April 26.

The elimination of the 0.4-acre wetland and the 0.6-acre wetland and the adverse impacts to portions of the linear waterway and its 3.0 acres of contiguous wetlands resulting from the discharges of dredged and fill material have reduced the various functions and values related to human health and welfare including water quality enhancement, flood flow attenuation, and

aesthetics. Storm water runoff will increase as a result of the newly constructed residential development.

The discharges of dredged and fill material to the 0.4-acre wetland and the 0.6-acre wetland, as well as the adverse impacts to portions of the linear waterway and its 3.0 acres of contiguous wetlands, resulted in the destruction of aquatic and wildlife habitat. Although mitigation for direct and temporal losses reduces the severity of impacts to the aquatic environment, wetland plants and animals were directly affected by the work when it occurred. In addition, prior to being filled, the wetlands and linear waterway had the ability to trap sediment, reducing the sediment load and turbidity of downstream waters. At the time of construction, the activities of the Respondents most likely resulted in increased sediment and nutrient load and turbidity downstream, as the wetlands and portions of the linear waterway were no longer available to trap sediment.

The potential for substantial cumulative loss of wetlands is great in this area. Hydrologically isolated wetlands of the northern Great Plains, known as "prairie potholes" and recognized for being extremely important as wildlife habitat, particularly for migratory birds, are now threatened as a result of the *SWANCC* decision. Consequently, hydrologically connected wetlands such as those impacted by the Respondents become increasingly significant for the functions and values they provide. In addition, as development increases in the Sioux Falls area, local wetlands are especially threatened.

Aerial photographs demonstrate that the 0.6-acre wetland and portions of the linear waterway were filled some time prior to April 26, 2001, and that by May 3, 2002, the 0.4-acre wetland had been filled and the linear waterway had been further impacted. Thus, by December 23, 2004, when EPA received the initial draft mitigation plan from the Respondents, the initial fill had been in place at least 1,337 days and the subsequent fill had been in place at least 965 days. As of the date of issuance of EPA's penalty complaint, the two fills had been in place for at least 1,600 and 1,230 days, respectively.

Even if the Respondents provide compensatory mitigation at a 3:1 ratio, as directed by EPA's Compliance Order, the temporal losses associated with the elimination of the 0.4-acre wetland and the 0.6-acre wetland, as well as with the adverse impacts to portions of the linear waterway and its 3.0 acres of contiguous wetlands, are significant.

B. Prior Compliance History

Candle Development, LLC, of which Mr. Daniels is a managing partner and the registered agent, is the subject of an administrative compliance order on consent that was filed September 3, 2004, for prior alleged violations of CWA Section 404 at a residential development site known as Candlelight Acres. Unauthorized discharges of fill to wetlands on that site took place some time prior to June 11, 1998. The Corps ordered Candle Development to cease and desist all unauthorized work at the site on July 8, 1998. A subsequent inspection found that

unauthorized work continued at that site, in violation of the cease and desist order. The case was referred to EPA for enforcement on December 16, 1999.

C. Degree of Culpability

The Respondents had actual knowledge of the laws applicable to the discharge of dredged and fill material to wetlands and other waters of the United States prior to conducting their unauthorized activities. Regarding a previous residential development known as Candlelight Acres, Mr. Daniels was advised by the Corps in a letter dated June 17, 1997, of the requirement to obtain a permit prior to discharging any dredged or fill material into waters of the United States. On July 8, 1998, based on an inspection that found that fill had been placed in wetlands at the Site without proper authorization, the Corps issued Mr. Daniels an order to cease and desist any further unauthorized work at the site. The case was subsequently referred to EPA, which then issued Mr. Daniels a notice of violation and section 308 information request on January 23, 2001. After protracted negotiations, an administrative compliance order on consent was filed against Candle Development, LLC, on September 3, 2004. Clearly, the Respondents had previous experience and knowledge of the Section 404 requirements prior to their unauthorized activities at the Sunset Ridge site. The fact that a consultant retained by the Respondents wrote to the Corps on April 4, 2001, regarding whether the wetlands at the Sunset Ridge site were subject to CWA jurisdiction and then submitted a permit application on August 3, 2001, seeking authorization to fill four acres of wetlands at the site (but failing to mention that some fill had already been discharged to waters of the United States) further demonstrates the Respondents' knowledge of the Section 404 regulatory requirements.

D. Economic Benefit or Savings

The objective of calculating and recovering economic benefit is to place violators in no better financial position than they would have been had they complied with the law. EPA has determined that the Respondents have gained an economic benefit as a result of the profit realized from the sales of homes that were constructed on lots that were created by the unauthorized discharge of fill material. In addition, the Respondents have gained an economic benefit as a result of the delayed costs associated with mitigation that is to be performed as a condition of resolution of this case and a return to compliance. Recovering the economic benefit or savings resulting from a violation is important because it removes any economic incentive for the violators' noncompliance and it levels the playing field in fairness to regulated entities who operate in compliance with the law. The economic advantage alone warrants assessment of a substantial penalty in order to recover the economic benefit of these violations and to deter others who might be motivated to break the law for economic reasons.

E. Ability to Pay

Because the burden of proof of an inability to pay rests with the Respondents, none of which has asserted an inability to pay with respect to these penalty proceedings, this analysis

assumes the Respondents can pay the full amount EPA is seeking. Updated information regarding this statutory factor may become apparent later and can be considered during settlement negotiations or litigation.

F. Other Factors

Collecting a penalty from the Respondents is important not only to deter additional violations by them, but also to deter violations of others. It is important to demonstrate that EPA is serious about enforcing all the substantive violations of the CWA. Failure to collect a substantial penalty from the Respondents would motivate violations by others who seek to profit from the discharge of dredged or fill material to wetlands and other waters of the United States in defiance of the law and unfairly penalize the members of the regulated community who commit time and expense to compliance. Sending the message that noncompliance may go unpunished also increases the risk that human health and the environment will be jeopardized by further violations.

The CWA is a strict liability statute, meaning that each person has an individual duty to know and comply with the requirements of the law. For unauthorized discharges of dredged or fill material, a violation begins when dredged or fill material is discharged into waters of the United States without a CWA section 404 permit and continues to occur each day that the illegal discharge remains in place. Pursuant to section 309(g)(2) of the CWA, EPA may seek an *administrative* assessment against each person who violates the CWA of up to $11,000 per day of violation, up to a total of $157,500, before an administrative law judge. Pursuant to section 309(d) of the CWA, the statutory maximum civil penalties EPA is entitled to seek in a *judicial* enforcement action for the same violations is $32,500 per day per violation. Clearly, the Respondents could each be liable for significantly higher penalties if EPA were to seek its redress in the federal district courts. However, in order to expedite resolution of this matter, EPA desires to use its Class II administrative penalty authority.

In this action, EPA is seeking penalties for violations that amount to less than five days of statutory maximum civil penalties under the CWA, even though the violations occurred at least as early as April 26, 2001, and, as noted previously, by the time the initial draft mitigation plan was received from the Respondents, the initial fill had been in place well over three years. The violations and resultant environmental damage could have been avoided if the Respondents had met their obligation to obtain a CWA section 404 permit. The above review of the statutory factors to be considered in determining an appropriate penalty fully supports the imposition of a penalty of up to $157,500 against the violators.

CERTIFICATE OF SERVICE

I certify that, on the date noted below, I hand delivered the original and one copy of the foregoing Administrative Penalty Complaint to:

Tina Artemis, Regional Hearing Clerk (8RC)
U.S. EPA, Region 8
999 18th Street, Suite 300
Denver, CO 80202-2466

I also certify that on the date noted below, I mailed a copy of the foregoing Administrative Penalty Complaint to each of the following as indicated below. In addition, Mr. Daniels, Mr. Kenison, and Mr. Tollefsrud were each sent a copy of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/ Termination or Suspension of Permits, 40 C.F.R. Part 22.

1. James P. Daniels
27160 470th Avenue
Tea, SD 56074-8112

By U.S. Mail, Certified Return Receipt No. 7003 2260 0002 0331 5413

2. Howard Kenison, Attorney
Lindquist & Vennum
600 17th St., Suite 1800 South
Denver, CO 80202

By U.S. Mail, Certified Return Receipt No. 7003 2260 0002 0331 5420

3. Tim Tollefsrud, Director, Division of Environmental Services
South Dakota Department of Environment and Natural Resources
Joe Foss Building
523 East Capitol Ave.
Pierre, SD 57501

By U.S. Mail, Certified Return Receipt No. 7003 2260 0002 0331 5475

Date: SEP 15 2005 Dayle De Arnold